FILED
MAY 16 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 573

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN RESPONSE TO THIS COURT'S REQUEST AND IN OPPOSITION TO THE PETITION FOR CERTIORARI.

NELSON TROTTMAN
400 West Madison Street
Chicago 6, Illinois
Attorney for Petitioner.

LOWELL HASTINGS
400 West Madison Street
Chicago 6, Illinois

PALMER LEREN
100 North Hale Street
Wheaton, Illinois
Of Counsel.

CHICAGO LAW PRINTING CORPORATION – FRANKLIN 2-6521

TABLE OF CASES

	PAGE
Bailey v. Megan, 102 F. 2d 651	1, 4, 8
Chicago and North Western Ry. Co. v. Eveland, 13 F. 2d 442	4, 5
Great Northern Ry. v. Weeks, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532	8
Mobile and Ohio R.R. v. State Tax Commission, 374 Ill. 75, 28 N.E. 2d 100	3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 573

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN RESPONSE TO THIS COURT'S REQUEST AND IN OPPOSITION TO THE PETITION FOR CERTIORARI.

In the brief filed by respondent in response to this Court's request: (1) it is conceded that the question is presented "whether Illinois' formula denies due process of law" (Br. p. 3); (2) the irreconcilable conflict with *Bailey* v. *Megan,* 102 F. 2d 651, is recognized (although

a technical distinction is suggested which the *Megan* opinion does not support); and (3) the discrimination between the assessment of petitioner's property and the property of the other Illinois railroads is not denied, but is brushed aside by saying in effect that this is not a matter concerning which petitioner has a right to inquire.

Respondent's statement (Br. p. 4) of what respondent conceives to be petitioner's contentions is misleading and inaccurate. The petitioner is not contending that the formula used by the Department "does not guarantee to any reasonable degree of assurance a valuation of railroad property as distinguished from a valuation of other elements * * *", nor does petitioner suggest that it "is not an average railroad and is not to be bound by a formula based upon average or typical situations". The State Constitution requires that all property be assessed uniformly. The statute requires assessment at "fair cash value." Petitioner asks that the constitutional requirements of due process and equal protection be given affect, to the end (1) that its property be not grossly overassessed through the reflection in the final valuation of a supposed standard of value (condemned in other decisions) having no logical relation to "fair cash value", and (2) that it be protected from the necessarily resulting discrimination against it, both as between petitioner's property and property generally, and as between petitioner's and other railroad property.

The suggestion, in this connection (Br. p. 4), that "so far as this Court is concerned, it makes no difference whether the tax in question is called and is intended to be a tax upon property, upon franchises, upon income or upon any other basis", is beside the point. The present Illinois Constitution does not permit the classification of property for taxation (with minor exceptions not here

material[1]); it contains no provision that would empower the state assessing officers to assess railroad property at a higher (or lower) percentage of "fair cash value" than other property; "every person and corporation" is required to pay a tax "in proportion to the value of his, her or its property" (see p. 5 of petitioner's original brief for text of provision); and it is the duty of assessing officers to assess railroad property on a uniform basis with property throughout the State. (Compare *Mobile and Ohio R. R.* v. *State Tax Commission*, 374 Ill. 75, 28 N.E. 2d 100.) Accordingly it is not correct, as respondent says (Br. p. 4), that "so long as Illinois has evolved, whether by legislation, administrative action or judicial exposition, a formula applicable to all railroads, there is no discrimination * * * so long as that formula is employed * * * even though petitioner should convince this Court that it was the victim of a grossly excessive valuation". That is just another way of saying that although the State Constitution commands uniformity and the statutes require all assessments to be at "fair cash value", yet the State administrative officers are at liberty, by a process of "evolution", to deny railroads the equal protection of these constitutional and statutory provisions. Such a construction would make a mockery of the equal protection clause. The very statement of the proposition condemns it.

Respondent, repeating the statement that the only question presented by the record "is whether Illinois' formula

---

[1] There is pending a proposal to amend the Constitution so as to permit the legislature "to define and classify property for taxation", but even under the proposed amendment "all real estate shall constitute one class", so that the effect of the amendment, if adopted, on assessments of railroad property cannot now be foretold. Joint resolution, appearing in 1955 Session Laws, p. 2291.

denies due process of law" (Br. p. 3), also says in the same connection (Br. p. 5) that "the only question here is whether Illinois has adopted and enforced an intrinsically legitimate formula of taxation and has applied it equally to all railroads". In so stating the question, respondent evidently recognizes that the propriety, under present conditions, of the use of reproduction cost as a standard for valuing a railroad property presents a Federal constitutional question, as it clearly does.

Yet respondent with curious inconsistency seeks to avoid the significance of *Bailey* v. *Megan*, 102 F. 2d 651, and also *Chicago and North Western Ry. Co.* v. *Eveland*, 13 F. 2d 442, upon the narrow ground that "the Court of Appeals for the Eighth Circuit had before it not only questions of due process and equal protection but plenary judicial discretion, similar to that possessed by the Supreme Court of Illinois" (Br. p. 5), from which respondent concludes that "a mere difference between two tribunals as to appropriate standards of taxation does not result in a conflict upon a *constitutional* question". (Br. p. 5; emphasis is respondent's.) Respondent overlooks the fact that while it is true that there was diversity of citizenship in the *Megan* case, the opinion states at the very outset (102 F. 2d 651 at p. 653) that the claim of the railway trustee was "that the taxes assessed were based upon a valuation which was so excessive, arbitrary and discriminatory as to violate the due process and equal protection clauses of the Fourteenth Amendment". Respondent also overlooks the fact that the Court in that case made it plain that it was not merely exercising "plenary judicial jurisdiction"; for, although it said (at p. 655) that it would be "fairer" to take the average of the stock and bond valuation and capitalization of earnings valuation, yet, as there was "no constitutional requirement that the taxing authorities use any particular method", they

were at liberty to adopt the stock and bond valuation, the higher of the two, as the maximum system value. The earlier *Eveland* case likewise turned upon the constitutional point, not "plenary judicial discretion". These cases, and the decision below, are hopelessly in conflict, a conflict that can only be resolved by a decision of this Court.

There is what seems to be a studied attempt, in respondent's brief, to convey the impression that the formula has been equally applied to all Illinois railroads, without discrimination, and that its impact upon the petitioner's property is due to circumstances peculiar to petitioner which do not obtain in "average or typical situations" (Br. p. 4). It has been abundantly demonstrated not only that the reproduction cost of the Illinois railroads as a class is in most cases far out of line with commercial values, but also that in nearly all cases the other final assessments can be readily justified on the basis of standards other than reproduction cost. (See pages 10 to 12, inclusive, and page 30, of original petition, and appendices E and F.) The plain fact is that the formula, whether "intrinsically legitimate" or not, has not been consistently applied and followed. There is surely no uniformity in a practice which reduces the petitioner's formula result from $97,730,000 to $86,750,000, or 11 per cent, while the formula result of the Gulf, Mobile and Ohio is reduced from $71,657,000 to $49,395,000, or 31 per cent (Appendices E and F to petition).

Thus the very premise of respondent's position falls. Respondent asserts (Br. p. 6) that[1] "if the formula is intrinsically fair in the average case and if it is applied to the case of railroads in general, then the situation of

[1] The text is somewhat garbled. Doubtless what is meant is: "the fact that the situation of an atypical railroad, such as petitioner claims to be, entails a hardship", etc.

an atypical railroad, such as petitioner claims to be it entails a hardship is of no constitutional moment". This statement proves too much; as all the railroads received adjustments in amounts varying as widely as from 10 to 34 per cent, the formula was evidently not "intrinsically fair in the average case". Certainly the present petitioner presents a more convincing case for a drastic adjustment of the formula than most, if not all, the other roads assessed, most of which were treated far more leniently. The wide variation from 10 to 34 per cent in these adjustments to the formula results alone condemns the formula and demonstrates either that the formula was unsound, or that, if it were sound, the formula was not evenly applied among the railroads, with a heavy resulting discrimination against petitioner's property.

A difficulty often stressed in connection with the ascertainment of value of a railroad operating property is the fact that it is seldom that a railroad is sold, so that it is nearly always impossible to use the criterion of comparative sales to arrive at the value of a railroad property. We do however now have a concrete sale of an Illinois railroad property, made at arm's length, which sheds considerable light on the relative reliability of the standard of capitalized earnings, anticipated future earnings, and reproduction cost, as measures of value. Since the petition in this case was filed last December, the Interstate Commerce Commission has approved the purchase, by a group of railroads, of the Illinois Terminal Railroad, for a price far below its reproduction cost, but which does bear a reasonable relationship to past and prospective earnings. The Commission's decision, not yet reported, was rendered April 2, 1956, in Finance Docket No. 18752. The "book value", said by the Commission to be based on its "valuation" as of December 31, 1951, (*i.e.*, so-called "physical value") was stated, after depreciation and also after sub-

traction of indebtedness for equipment, to be $33,499,620.[1] Yet the purchase price was only $20,150,605, less than the "valuation" by about 35 per cent, or $13,349,015.[2] On the other hand, past earnings were a little less than five per cent, and after certain adjustments,[3] about 4¼ per cent, on the purchase price, from which fact the Commission said that "it is apparent * * * that the purchase price for the Illinois Terminal properties is fair, reasonable and fully justified".

Nor was that the whole picture. Of the depreciated "book value", a bridge over the Mississippi River, the McKinley Bridge, accounted for $2,224,903, although its earning power approximated over $365,000. As a part of the transaction, the purchasers plan to sell the bridge to public authorities for $13,500,000 and to lease back the right to operate railroad tracks over it. Thus, on this basis the purchasers would pay, net, only $6,515,635 ($20,015,635 less $13,500,000) for a railroad property having a depreciated "book value" of $31,459,856 ($33,684,759 less $2,224,903). It is apparent that the purchase price of the Illinois Terminal was not influenced to any degree by the so-called "physical value".

---

[1] It is not clear from the Commission's opinion whether this "book value" represents the original Federal valuation plus the cost of subsequent additions and betterments, or represents reproduction cost at prices current in 1951. The figures are shown in a table in the opinion.

[2] This is shown in the table in the opinion as the "acquisition adjustment", provided for under Commission accounting rules, that is, the difference between book value before acquisition and the cost of acquisition.

[3] The Commission's opinion uses the phrase "adjusted net income" without explanation of the nature of the adjustments, but the context suggests the difference represents income of the bridge, which it is planned to sell to public authorities.

Respondent makes no attempt to controvert what is said in the petition regarding the decisions of this and other tribunals that in other situations have consistently held that under present day conditions there is no logical relationship between the reproduction cost of a railroad property and its value; it is not denied that the decision below is in conflict with the *Megan* case, although a half-hearted attempt is made to draw a distinction between the two cases on the ground that in the *Megan* case the Court was exercising "plenary judicial discretion"; no attempt is made to reconcile the decision below with, or distinguish it from, this Court's decision in *Great Northern Ry.* v. *Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532; and, finally, the obvious discrimination between the railroads themselves is not denied, but is passed over with the brief (and incorrect) comment (on p. 7), that if the challenge to this discrimination were upheld, it would mean that petitioner would be allowed "to try not only its own case but the tax case of every other railroad in Illinois". Respondent has not, it is submitted, rebutted the case made out in the petition for the granting of certiorari to review the decision below herein.

Respectfully submitted,

NELSON TROTTMAN
Attorney for Petitioner.

LOWELL HASTINGS
PALMER LEEEN
Of Counsel.